NO. 88-88-1276

In The Supreme Court of the United States

OCTOBER TERM, 1988

Supreme Court, U.S.
FILED
JAN 31 1989
JOSEPH F. SPANIOL, JR.
CLERK

ROBERT B. MACHEN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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January 31, 1989

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QUESTIONS PRESENTED

1. Whether the accused's privilege to be free from compulsory self-incrimination, guaranteed by the Fifth Amendment, was violated by using his immunized grand jury testimony at trial, with the following particular questions being at issue.

a. Whether the government's use of the immunized testimony was a violation of 18 U.S.C. 6002, in that the testimony was introduced at the trial in which there were counts against the accused unrelated to statements made under the immunity order.

b. Whether immunized grand jury testimony is admissible as evidence in the attempt to impeach testimony at trial, rather than to support a claim that the immunized testimony itself was false.

c. Whether the government can refer at trial to the accused's taking the Fifth during grand jury testimony as evidence that the accused was unwilling to testify, when, in fact, the accused was required to take the Fifth to trigger the order of immunity. In other words, does the procedure used to bring immunity into play, since it requires the verbal taking of the Fifth, conflict with the actual right against self-incrimination under the Fifth? Are there two "Fifth Amendments" - a procedural one and a substantive one?

d. Whether the government can argue at trial that the accused was free to testify at the grand jury, but simply refused, when, in fact, the testimony of the accused was compelled and given under an order of immunity.

PARTIES TO THE PROCEEDING

The parties before this Court are the same as those identified in the caption of this petition.

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No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

ROBERT B. MACHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Robert B. Machen, respectfully prays that a writ of certiorari issue to review the judgment of the Fourth Circuit in this proceeding entered on November 8, 1988, with the Petition for Rehearing denied on December 2, 1988.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals is unpublished, and included in the Appendix at 1a-3a. The Order denying rehearing, entered on December 2, 1988, is included in the Appendix at 4a.

JURISDICTION

The final judgment of the Fourth Circuit Court of Appeals was entered on December 2, 1988, in the form of an Order denying rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Self-Incrimination Clause of the Fifth Amendment to the Constitution of the United States, which provides:

> No person...shall be compelled in any criminal case to be a witness against himself...

The federal immunity statutes, 18 U.S.C. § 6002 and 6003, are set out in the Appendix at 5a-8a.

STATEMENT OF THE CASE

The lengthy criminal proceedings in which the petitioner, Robert B. Machen, has been ensnared began for him with a visit to Mr. Machen's law office by an investigator with the Internal Security Division of the Internal Revenue Service on March 20, 1984. Mr. Machen was served with a subpoena for a variety of his law office bookkeeping records, which purportedly might show if payments had been made to Mark Kellogg, an attorney who was the target of the investigation. As the investigation continued, there became quite a controversy as to whether and in what manner some of Mr. Machen's

bookkeeping records might have been altered. It should be noted that charges have never been brought against Mark Kellogg.

Mr. Machen was served with a second grand jury subpoena on January 29, 1985, which required him to produce overhead account ledgers and checkbook stubs. Mr. Machen was given immunity concerning his production and identification of the subpoenaed documents. The Motion for immunity and Order of Immunity are set out in the Appendix at 9a-18a. The last sentence of the Order states that:

> This Order shall become effective only if Robert B. Machen refuses to testify or provide other information on the basis of his privilege of self-incrimination.

Even though Mr. Machen had been granted production act immunity and use immunity for his grand jury testimony [Appendix 17a-18a], there was substantial

confusion concerning the testimony he gave at the grand jury on January 30, 1985. The relevant grand jury testimony is included in the Appendix at 19a-28a. Part of the confusion involved the definition of the word, "original," as in "Are these originals, as compared to copies, or as compared to drafts?" In the course of the questioning, Mr. Machen indicated that he was taking the Fifth Amendment in response to a question about records being the originals.

Mr. Machen was subsequently indicted on October 5, 1987. The indictment is set out in the Appendix at 29a-48a, and includes four counts of obstruction of justice (18 U.S.C § 1503), two counts of witness tampering (18 U.S.C § 1512), and one count of perjury (18 U.S.C. § 1623).

A trial was held in the Eastern District of Virginia, Alexandria Division,

commencing on December 7, 1987, with the Honorable Albert V. Bryan, Jr., presiding. On December 10, 1987, the jury returned guilty verdicts on Counts One and Six (Obstruction of Justice), and on Count Four (Witness Tampering). The jury returned a not guilty verdict on Count Five (Witness Tampering). The other three counts were then dismissed without prejudice on the government's motion. On January 8, 1988, Mr. Machen was sentenced for twelve (12) months on each of Counts 1, 4 and 6, to run concurrently, and was fined $5,000 on each of Counts 1 and 6.

The Government's Use of Immunized Testimony at Trial

At trial, the government sought to utilize Mr. Machen's grand jury testimony, given on January 30, 1985. It is important to note that Counts Six and Seven of the Indictment related to events

on January 30, 1985, at the grand jury. However, Counts One through Five of the Indictment were for time periods of March 1984 through June 1984. In addition, Mr. Machen was not convicted on Count Seven, which accused him of making false material declarations while a grand jury witness on January 30, 1985. **In other words, to this day, there has been no showing or proof that Mr. Machen committed perjury or made false statements to the grand jury.**

At trial, Mr. Machen testified about the confusion as to the term, "original," in identifying the subpoenaed documents. See excerpts of his testimony, set out in Appendix at 49a-58a. It should be explained that this controversy arose because the government was trying to show that Mr. Machen or those at his command had altered or changed documents and that he was misleading the grand jury. Mr.

Machen submits that he was simply trying to explain the origin of the documents he produced on January 30, 1985.

Before cross-examination, the U.S. Attorney requested a ruling as to whether he could refer to Mr. Machen's taking the Fifth at the grand jury [in Appendix at 58a-65a]. See excerpts of Machen cross-examination, set out in the Appendix at 65a-72a. The U.S. Attorney explained to the judge that Mr. Machen took the Fifth, and yet Mr. Machen was stating at trial that he had wanted to talk more while testifying at the grand jury. It was the position of the U.S. Attorney that by Mr. Machen's taking the Fifth at the grand jury, he precluded additional questioning and, therefore, could not claim at trial that he had wanted to explain his position further while a grand jury witness. The court's ruling was as follows:

> He can take the Fifth on the advice of attorney but I don't think he can testify as he has and leave the impression that yes, if I would have just been asked I could have given the explanation of that. I will let you go into that. [In Appendix at 64a]

In light of the court's ruling, the U.S. Attorney asked Mr. Machen about his taking the Fifth, including the following dialogue:

Q. You are aware, are you not, that with respect to - to your testimony, your verbal testimony in that case, in the grand jury regarding matters surrounding the Mark Kellogg case, which the grand jury was investigating, that if you took the Fifth Amendment, I couldn't ask you any questions about that, isn't that correct? Anything you invoked the Fifth Amendment on could not be inquired into by the prosecutor? Isn't that right?

A. I didn't know that, no.

During trial, the U.S. Attorney made numerous references to Mr. Machen's taking the Fifth. Then, in closing argument (excerpts of which are set out in the Appendix at 76a-80a), the U.S. Attorney stated that Mr. Machen had immunity in the grand jury and yet he took the Fifth. Thus, the U.S. Attorney argued, in an attempt to impeach Mr. Machen, that Mr. Machen's trial testimony that he had no opportunity to explain was incorrect, and that Mr. Machen sought to mislead the trial jury about what had happened at the grand jury.

The facts, however, are not as the U.S. Attorney argued to the jury. Mr. Machen was <u>required</u> to take the Fifth at the grand jury to put into effect the Order of Immunity. Thus, his purpose in taking the Fifth was merely to follow procedure, and not to cut off questioning.

The Appeal

The appeal followed denial of a motion for a new trial, based on newly-discovered evidence. The Fourth Circuit, in an unpublished opinion, stated that the fact that Mr. Machen claimed the Fifth Amendment privilege was admissible because of his trial testimony that he had wanted to tell the grand jury the entire story. The Fourth Circuit relied upon Robinson v. United States, 108 S.Ct. 864, 866 (1988), in its opinion.

REASONS FOR GRANTING THE WRIT

I. The Court should grant certiorari to consider the numerous violations, both procedural and substantive, of Mr. Machen's privilege against self-incrimination.

The conduct of the government during the entire investigation and trial is so problematic that it is difficult to argue effectively the extent of the miscarriage

of justice in this case. The destruction of such an outstanding attorney by these proceedings literally shocks the conscience, as evidenced by the truly moving, both in content and quality, letters sent to Judge Bryan prior to sentencing. This is one of the very rare cases in which this Court should grant certiorari because of the gravity of the miscarriage of justice. As an officer of the court, who has worked honorably for countless clients, this man only deserves a fair shake in the same justice system in which he has helped so many others. So many years of accomplishment and service must not be engulfed by a combination of semantics about the word, "original," and a variety of confusions as to bookkeeping. Counsel for petitioner is fully aware that this Court entertains all manner of urgent pleas. Nevertheless, this is really such

a case to which the strongest words must be attached. The conduct of the government in its use of Mr. Machen's grand jury testimony is but an example, although an egregious one, of the extent of the violation of Mr. Machen's constitutional rights.

This Court has recently reaffirmed the privilege against self-incrimination, which was so blatantly violated in Mr. Machen's case. Thus:

> Testimony obtained pursuant to a grant of statutory use immunity may be used neither directly nor derivatively. 18 U.S.C. § 6002 [18 U.S.C.S. § 6002]; Kastigar v. United States, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972). And "[o]ne raising a claim under [the federal immunity] statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources." Id. at 461-462, 32 L.Ed.2d. 212, 92 S.Ct. 1653.

Braswell v. United States, 487 U.S. ____, 101 L.Ed.2d. 98, 108 S.Ct. ____ (1988), at 101 L.Ed.2d 114. It is undisputed that Mr. Machen testified under a grant of immunity [but did not know he was a target]. Therefore, the government had a "heavy burden" before utilizing his testimony. Not only did the government not bear a heavy burden, it simply failed to bear any burden at all. In an oft-cited case, this Court has been emphatic in noting that:

> Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.
>
> The Superior Court of New Jersey, Appellate Division, correctly ruled that a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial.

New Jersey v. Portash, 440 U.S. 450, 59 L.Ed.2d 501, 99 S.Ct. 1292 (1979) at 459-460. Mr. Machen respectfully submits that Portash is absolutely controlling of his situation, in which the government cited his taking the Fifth in the grand jury to impeach him at trial. The fact that Mr. Machen took the Fifth in the grand jury had no bearing whatever on whether his grand jury statements were false. Thus, the thread of the government's argument about the Fifth was focused only on placing Mr. Machen in a bad light at trial. This tactic is absolutely prohibited by the Fifth Amendment. There can be no "balancing" between Mr. Machen's credibility and some other governmental concern, with examples noted in Portash, such as deterrence of police illegality. Id. at 458.

The Fourth Circuit's reliance upon United States v. Robinson was clearly misplaced. Robinson dealt with comments by the defense counsel that the government did not give the defendant an opportunity to explain, and subsequent comments by the prosecutor that the respondent "could have taken the stand and explained it to you." Id. at 99 L.Ed.2d 27. The Robinson decision is about a different aspect of the Fifth Amendment privilege against self-incrimination. In the case at hand, the Fifth Amendment occurred in the context of gaining statutory immunity in a grand jury. In Robinson, the Fifth Amendment privilege involved the liberty not to be required to testify at trial. At the grand jury, **Mr. Machen did not take the Fifth in the sense of refusing to testify, but, rather, in the sense of activating his grant of immunity.** Further,

Mr. Machen testified at trial. The government was commenting upon Mr. Machen's immunized testimony, and using it as evidence. This is clearly prohibited. The source of much of the confusion and subsequent violation of Mr. Machen's rights appears to have been the sloppy procedure by which Mr. Machen was granted immunity. This is not something to be done haphazardly, and "prosecutors must follow specific procedures in granting individuals immunity." United States v. Friedrick, 842 F.2d 382 (D.C.Cir. 1988) at 394. Further, the "Fifth Amendment privilege is not self-executing and thus must be invoked by an individual seeking to enjoy its protection." Id. at 395. The Order of Immunity had specific language requiring Mr. Machen to refuse to testify for the Order to become effective. Thus, it seems apparent that Mr. Machen's

taking the Fifth at the grand jury was part of this "specific procedure" to be followed.

It certainly appears that "taking the Fifth" can have two very different meanings. One is sort of a procedural green light, which triggers immunity and, thereafter, full testimony. The other version is a substantive "taking the Fifth," which truly signals a refusal to testify. It is utterly unclear how a witness is instructed on which meaning the verbiage "taking the Fifth" may have. This, presumably, is the reason for the requirement for specific procedures. In this case, it would appear that the specific procedures were not followed, so that the U.S. Attorney was sufficiently confused as to the meaning of Mr. Machen's Fifth. Regardless of the explanation for this confusion, Mr. Machen should not have

to suffer its consequences. The fact that Mr. Machen should not have to parse for himself which question means what is obvious. Thus:

> (t)he Government contends that Friedrick was free to refuse to answer questions relating to his exposure as a potential defendant in a false statements prosecution; but, as an immunized witness, Friedrick had no choice but to answer questions relating to a possible grand jury appearance. We disagree that the admissibility of Friedrick's answers to questions, i.e., whether each question, taken alone, was compelled, can in these circumstances depend on to which branch of Friedrick's status each question was directed. Just to state the relationship is to suggest its considerable complexity. This is especially so considering the close interrelation of the two "prongs" of questioning; the possible false statements by Friedrick and possible obstruction of justice in the Presser investigation both arose out of the same conduct by Friedrick and his colleagues. It belies reality to expect an interviewee - even an FBI veteran who graduated from the Naval Academy - to evaluate each

> question during the course of a four-day interview and to decide for himself each time whether the question is one he is compelled to answer or is, in contrast, one as to which he may remain silent.

United States v. Friedrick,, supra at 399. This concern aptly describes the confusion exhibited by Mr. Machen during his grand jury testimony and described by him at trial. An additional reason for this Court to grant certiorari is to set out guidelines for taking the Fifth, to **eliminate the confusion as to whether the words, "take the Fifth," are a procedural trigger to immunity or a substantive refusal to testify pursuant to the privilege against self-incrmination.** Surely, it is grossly unjust for Mr. Machen to bear the burden of this confusion.

Another constitutional problem occurred because Mr. Machen was tried on

seven counts, with the alleged wrongdoing occurring at different times. It is at least arguable that false immunized statements are admissible. United States v. Apfelbaum, 445 U.S. 115, 63 L.Ed. 2d 250, 100 S.Ct. 948 (1980) at 131-132. While it may appear that Mr. Machen's grand jury testimony was admissible because of the perjury charge, Count Seven, the matter is really more complex. First, it must be noted again that Mr. Machen was not convicted on Count Seven, so it has not been found that he did make any false statements to the grand jury. Even so, the government sought to use Mr. Machen's grand jury testimony for a different reason. It was not used to prove perjury, but was used to contradict his testimony at trial. This use is clearly prohibited by 18 U.S.C. § 6002. It can certainly be argued, as well, that

the government had another true reason to emphasize incessantly that Mr. Machen took the Fifth. The government's argument went farther than a simple impeachment or inconsistency between any two factual assertions. It was the appearance and image created by what the factual assertion was - i.e., that Mr. Machen took the Fifth. Surely, even under Robinson, the harangue [advising the jury twelve times] about the Fifth amounts to an abuse of the privilege against self-incrimination (ignoring that the grand jury issue is involved, as well). This also is a clear and massive violation of Mr. Machen's Fifth Amendment rights. It is impossible for the jury to sever its impression that Mr. Machen took the Fifth from whatever actual testimony it heard on all seven counts.

A corollary to this is that five of

the seven counts had nothing to do with Mr. Machen taking the Fifth or possibly making false statements in the grand jury. The only exception to 18 U.S.C. § 6002 is for prosecution for perjury, giving a false statement, or failing to comply with the Immunity Order. It was error to lump together counts concerning the Immunity Order with counts wholly unrelated. The taint from the Fifth Amendment violations on Counts Six and Seven infected the other counts as well. Thus, trying Mr. Machen on seven counts and convicting him on three counts violated his Fifth Amendment privilege against self-incrimination.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ELAINE MITTLEMAN
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(703) 734-0482
Counsel for Petitioner

January 31, 1989

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 88-5012

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROBERT B. MACHEN
Defendant - Appellant

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Albert V. Bryan, Jr., District Judge. (CR-87-234-A)

Argued: October 13, 1988
Decided: November 8, 1988

Before RUSSELL and WILKINS, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Stephen A. Armstrong for Appellant. Kenneth Melson, First Assistant United States Attorney (Henry E. Hudson, United States Attorney; Justin W. Williams, Assistant United States Attorney on brief) for Appellee.

PER CURIAM:

The defendant, a lawyer, was

convicted of obstruction of justice and witness tampering. He brought the case here with the assertion of nineteen separate claims of error.

The defendant received referral of a tax case from an agent of the Internal Revenue Service. The agent also provided assistance in the processing of the case, in violation of rules of the Service. Because of an investigation of the Revenue Agent, the defendant instructed his bookkeeper to alter some financial records. The altered documents were later submitted to a grand jury. Asked, on cross-examination, whether the documents were originals, Machen responded with a claim of his privilege against self-incrimination.

During the trial, Machen testified that he had wished to explain the altered documents to the grand jury. In response,

the prosecution introduced evidence of the fact that, before the grand jury, he had claimed his Fifth Amendment privilege. Having cut off his cross-examination before the grand jury by his claim of his Fifth Amendment privilege, the defendant may not claim, before the trial jury, that he had wished to tell his whole story to the grand jury. If he makes such a claim during the trial, evidence of the fact of his claim of his Fifth Amendment privilege becomes admissible. Robinson v. United States, 108 S.Ct. 864, 866 (1988).

None of the other eighteen contentions deserve mention.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Fourth Circuit

No. 88-5012

UNITED STATES OF AMERICA
Plaintiff - Appellee

v.

ROBERT B. MACHEN
Defendant - Appellant

O R D E R

Upon consideration of the Petition for Rehearing in the above-entitled case and with the concurrence of Judge Russell and Judge Wilkins,

IT IS ORDERED that the Petition for Rehearing be, and it is, hereby denied.

/s/ Clement F. Haynsworth, Jr.
Clement F. Haynsworth, Jr.
Senior Circuit Judge

December 2, 1988

APPENDIX C

18 USC 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to--

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part [18 USCS 6001 et seq.], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any

information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

APPENDIX D

18 USC 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment--

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:

GRAND JURY INVESTIGATION (GRAND JURY 84-2) (JOHN DOE #630) (ROBERT B. MACHEN)	))))	No. _____ UNDER SEAL

MOTION

COMES NOW the United States, by and through its undersigned counsel, and moves that this Court issue an order pursuant to the provisions of Title 18, United States Code, Sections 6002 and 6003 compelling Robert B. Machen to appear before the Grand Jury of the United States presently empaneled in this District and surrender to the Grand Jury business records presently in his possession. As grounds therefor the United States asserts the following:

1. On January 29, 1985, Robert B. Machen was personally served with a

subpoena duces tecum issued on behalf of the Grand Jury presently sitting in this District. The said subpoena is annexed hereto as Exhibit A. The subpoena was issued to obtain records in Mr. Machen's possession regarding his business records pertaining to the law firm of Robert B. Machen and Machen and Thacher.

2. Mr. Machen is a subject of the investigation presently being conducted by the Grand Jury.

3. Mr. Machen has retained Alfred D. Swersky to represent him. Mr. Machen has indicated to the undersigned counsel, through counsel, that he would not comply with the subpoena duces tecum issued to him unless he was granted immunity for the production and identification of the subpoenaed documents.

4. The business and personal records sought by the above mentioned subpoenas

are not privileged and the grand jury is entitled access to the contents of those records. Mr. Machen may accurately be described as a sole proprietor of the law firm of Robert B. Machen and Machen and Thacher, whose business records have been subpoenaed. Consequently, the act of turning over the records by Mr. Machen to the Grand Jury could have testimonial implications protected by the Fifth Amendment.

5. The Government submits that the procedures established by the Supreme Court in United States v. John Doe, ___ U.S. ___, 52 U.S.L.W. 4296 (February 28, 1984) and by the Fourth Circuit in United States v. Fishman, 726 F.2d 125 (4th Cir. 1983) are applicable and that before compliance with the subpoena may be compelled, Mr. Machen must be granted limited immunity which will preclude the

government from subsequently using against him the fact of his compliance with the subpoena.

In John Doe, the Supreme Court held that the contents of records are not subject to any Fifth Amendment protection if the records are voluntarily prepared. 52 U.S.L.W. at 4298. The Court further found that the use immunity which must be granted by the government under 18 U.S.C. 6002 need only be coextensive with the scope of the party's privilege, that is, the act of producing the documents. Id., at 4300. Also see United States v. Fishman, supra, and In Re Grand Jury Proceedings (Martinez), 626 F.2d 1051, 1058 (1st Cir. 1980). Thus, the grant of immunity sought here would be extended only to the physical act of surrendering and identifying the documents subpoenaed to the Grand Jury. The government does

not seek by this motion to confer immunity for any testimony which may be offered or volunteered by the witness, nor would the immunity sought impose any limitations upon the use of the documents or their contents in any subsequent criminal proceedings.

6. In the judgment of the undersigned, the material sought by the subpoena in question may be necessary to the public interest.

7. This application is made with the approval of Steven S. Trott, Assistant Attorney General in charge of the Criminal Division of the Department of Justice pursuant to the authority vested in him by 18 U.S.C. 6003(b) and 28 C.F.R. 0.175(a). A copy of the letter from Assistant Attorney General Trott expressing such approval is attached hereto as Attachment 1.

Wherefore, the United States requests this Honorable Court to order Robert B. Machen to surrender to the Grand Jury all documents in his possession, custody or control called for by the attached subpoena duces tecum served upon him on January 29, 1985 and seeking production of the records as specified in the subpoena. The United States also requests that the Court instruct Robert B. Machen that when he complies with the Court's ORDER OF IMMUNITY and surrenders the documents sought by the subpoena, the fact of his compliance with the subpoena may not be used against him in any criminal case, except in a prosecution for perjury, giving false statements or otherwise failing to comply with the Court's Order. Further, the United States requests that the witness be instructed that the ORDER OF IMMUNITY does not confer immunity upon

him with respect to any testimony that he may elect to give before the Grand Jury other than the production and identification of the documents detailed in the attached subpoena issued to Robert B. Machen on January 29, 1985, together with any additional questions that may be asked by the attorney for the United States of Robert B. Machen before the Grand Jury; and that the witness may assert the Fifth Amendment privilege in the Grand Jury with respect to any questions put to him in connection with that proceeding.

Respectfully submitted,

ELSIE L. MUNSELL
UNITED STATES ATTORNEY

By: _____
Kenneth E. Melson
Assistant United States
Attorney

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

IN RE:

GRAND JURY INVESTIGATION (GRAND JURY 84-2) (JOHN DOE #630) (ROBERT B. MACHEN)	))))	No. _____ UNDER SEAL

ORDER OF IMMUNITY

This matter is before the Court on the Application of the United States pursuant to Title 18, United States Code, Sections 6002 and 6003 for an order that the witness Robert B. Machen surrender to the Grand Jury of the United States presently sitting in this District business and personal records in his possession. The records sought are particularized in a subpoena personally served on Mr. Machen on January 29, 1985, being further identified as Exhibit A in the Government's Motion for Immunity.

Upon consideration of the application

of the United States in the proceedings before me today the Court hereby ORDERS Robert B. Machen to appear before the Grand Jury on January 29, 1985 to surrender and identify the records called for in the aforedescribed subpoena issued to him January 29, 1985.

The Court instructs the witness, Robert B. Machen, that when he complies with the Court's ORDER OF IMMUNITY and surrenders the documents, the fact of his compliance with the aforedescribed subpoenas may not be used against him in any criminal case, except in a prosecution for perjury, making false statements or failing to comply with this Court's ORDER OF IMMUNITY. The Court further instructs the witness, Robert B. Machen, that his ORDER OF IMMUNITY does not confer immunity upon him with respect to any testimony that he may elect to give before the Grand

Jury other than the production and identification of the documents detailed in the aforedescribed subpoena served upon Robert B. Machen on January 29, 1985, together with any additional questions that may be asked by the attorney for the United States of Robert B. Machen before the Grand Jury.

This Order shall become effective only if Robert B. Machen refuses to testify or provide other information on the basis of his privilege of self-incrimination.

_____
UNITED STATES DISTRICT JUDGE

This ____ day of January, 1985.

APPENDIX F

[Grand Jury 84-2, January 30, 1985]

Whereupon,

ROBERT B. MACHEN

was called as a witness and, after being first duly sworn by the Foreperson of the Grand Jury, was examined and testified as follows:

[Questions by Assistant U.S. Attorney Kenneth E. Melson]

Q Okay. Let me show you then Grand Jury Exhibit No. 25.

(Whereupon, the document referred to as Grand Jury Exhibit No. 25 was marked for identification.)

BY MR. MELSON:

Q Ask you to identify that, please.

A Okay. This is MTOH Cash Receipts Total for 1983 and out on the side it says 1983. Out here it says 1983 and first quarter.

Q All right. And what is MTOH?

A It should be Machen/Thatcher Overhead Account, Overhead.

Q And this is, then the total for 1983?

A Yes.

Q All right. And No. 26.

(Whereupon, the document referred to as Grand Jury Exhibit No. 26 was marked for identification.)

WITNESS: Okay. MTOH Cash Disbursements, Totals and it has on it 1984 and this is 1984.

BY MR. MELSON:

Q And these two records, 25 and 26 are also business records that were kept by your employees for you?

A Yes.

Q Are they the orignals?

A Those are, yes.

Q Are there any here that are not originals?

A Not that I know. Could I go talk to Fred?

Q Yes.

A I want to ask him something.

MR. MELSON: If the record would reflect that Mr. Machen is leaving the Grand Jury room to consult with him [sic] attorney, Mr. Swarshki [sic].

(Whereupon, at 11:24 the witness leaves the Grand Jury room.)

(Whereupon, at 11:25 the witness returns to the Grand Jury room.)

WITNESS: My question to you is, is that, do you means original as opposed to Xerox copies?

BY MR. MELSON:

Q No. My question is are these the records as they were originally prepared, the originals records?

A Originally prepared records?

Q Yes.

A Excuse me again.

MR. MELSON: The record should also reflect he's exiting again to consult with his attorney.

(Whereupon, at 11:26 a.m. the witness leaves the Grand Jury room.)

(Whereupon, at 11:27 the witness returns to the Grand Jury room.)

WITNESS: These are the original documents that I was able to find in response to the subpoena.

BY MR. MELSON:

Q These are the records that have originally been prepared by the bookkeeper?

A Well, these are the ones that I could find in response to the subpoena and I've been instructed by my attorney not to go any further in the answer to that.

Q Are you saying you are refusing to answer any further questions in that

regard based upon your Fifth Amendment right?

A That's my understanding, yes.

Q All right. And the question that I was asking in which you're taking the Fifth Amendment is, are these the original records prepared by the bookkeeper? Is that the question?

A These are the ones that I could find in response to the subpoena.

Q The question that I was asking, though, you are taking the Fifth Amendment to?

A Yes.

Q All right. We'll come back to that. Let me finish with the other records then. Do you have anything else to present to the Grand Jury then with respect to paragraph No. 2?

A Not at this time. If I've got anything else I'll be glad to present it

to you.

Q Okay. Let's go on to No. 3. All original 1983 Machen/Thatcher overhead account ledgers. Those are total ledgers. I think those are 25 and 26.

A Oh, okay. That's what I -

Q Is that, see if they are 25 and 26?

A That's 24.

Q Are these the total cash receipt ledgers for 1983, Exhibit 25?

A Yes.

Q All right. No. 4 is all original checkbooks or books including check stubs of the Machen/Thatcher overhead account for the years 1982 and 1983.

A I didn't quite understand all of that, but here are the check stubs for those two years.

Q Okay. Let's start with one of them first. Let me put Grand Jury exhibit sticker No. 27 on the first page of this

pile of check receipts and would you identify what these are for, check stubs, rather?

(Whereupon, the document referred to as Grand Jury Exhibit No. 27 was marked for identification.)

WITNESS: These are check stubs from the overhead accouant.

BY MR. MELSON:

Q For which year?

A The 1982.

Q Okay. And they go from which number, what's the first number?

A Well, the first number is 1064 and the last number is 1651. Now, could I add that there are, there might be some checks numbers, well, in there it should be all there, the stubs, sorry.

Q Okay. Where are the checks that relate to these stubs?

A I have them here.

Q All right. Why don't you give those to me now?

A Okay. I am starting with 1982, what I think is all the checks in 1982 in the overhead account. I have an envelope saying February 1982. The seal on that is broken here but I think that's March and April. Let's see, June, July, August, September, October, September again, December. There is January and February. That could be 1983. Let me see it. Can I look in it?

Q Sure.

A This shows 02/26/82. That's the slip on the inside and 03/81-82. This is 04/30/82 and there's a note in here. Due to processing problems on April 30 some debit and credits were not posted to the account. But that's the note that's in there.

Then there's one that's June 05/1,

05/29, 07/01, 7/31, 9/01, 10/1, 10/30, 12/01/82 and 12/31/82.

Q Are those numbers that you read off the dates appearing on a statement inside each of the envelopes?

A Yes, it was.

Q For the year 1982?

A Yes, it looks like there might be one missing. Look on the dates. Is it May?

Q You appear to be missing January of '82.

A Would it be all right if I would pass that to you?

Q If you don't have it here we'll get it later.

A Okay. If that's all right because I have them. I know that they're -

Q All right. And then let me -

A Wait a minute. Could I have it?

Q January of '82.

A The checks are probably sequenced in here, but that's all right. I'll still provide it if I have any checks out.

Q Well, let me put Exhibit No. 28 on the package of stubs which I'll have you identify by beginning and ending number.

A Okay. The beginning number is 1652 and the ending number is 1954.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO.
	)	87-00234-A
ROBERT B. MACHEN	)	

October, 1987 Term -- at Alexandria

SUPERSEDING INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. In March of 1984, Grand Jury No. 84-2 of the Alexandria Division of the United States District Court was inquiring into and investigating allegations of possible violations of federal conflict of interest laws, including possible violations of Title 18, United States Code, Section 205, the said investigation being designated as United States v. John Doe No. 630.

2. In March of 1984, defendant ROBERT

B. MACHEN was an attorney at law with offices in Fairfax County, Virginia.

3. It was material to and a part of the aforesaid investigation for Grand Jury No. 84-2 to obtain from ROBERT B. MACHEN, any and all records of legal work performed for him by an attorney whose initials are "M.K." (hereinafter "M.K."), during the years 1982 and 1983, and any records of work performed by "M.K." as a sole practitioner sharing space with ROBERT B. MACHEN.1/

4. It was a further material matter to and a part of the aforesaid investigation for Grand Jury No. 84-2 to obtain from ROBERT B. MACHEN, any and all records and books of accounts, including disbursements journals, showing payments

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1/ The Grand Jury has used initials to identify the attorney rather than his full name. The full name of the attorney, known to the Grand Jury will be provided in a bill of particulars.

and disbursements to attorney "M.K." during the years 1982 and 1983 for legal work performed by "M.K." on behalf of, for, or in conjunction with, defendant ROBERT B. MACHEN or by "M.K." as a sole practitioner.

5. As a part of the investigation of Grand Jury No. 84-2, a grand jury subpoena was served on ROBERT B. MACHEN on March 20, 1984, in connection with the matter styled John Doe No 630, commanding the defendant to appear in the United States District Court on March 28, 1984 at 9:30 a.m. before the Grand Jury, and to bring with him, in pertinent part, all books of accounts receivable for the years 1982 and 1983, all disbursements journals for 1982 and 1983, and all records indicating any payments to attorney "M.K." for services rendered ....

6. In or about March 21 to March 26,

1984, at Fairfax, Virginia in the Eastern District of Virginia ROBERT B. MACHEN, the defendant, unlawfully, knowingly, willfully and corruptly did influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice by (1) directing, ordering, instructing and telling "S.R.", an employee and secretary of the defendant to change, alter, rewrite, modify and re-do in their entirety certain journals, ledgers and records which were the subject of the Grand Jury subpoena described in paragraph 4 above, served on the defendant on March 20, 1984, including the elimination in these records of references to attorney "M.K.", and (2) by the defendant himself secreting, misappropriating and destroying copies of his records covered and required to be produced pursuant to the said Grand

Jury subpoena, and (3) by the defendant causing and aiding and abetting in the fabrication and production of false, altered, re-written, spurious books, records, journals and ledgers purporting to eliminate any reference and entries as to attorney "M.K.", and which were likewise subject matter covered by the aforesaid Grand Jury subpoena served upon the defendant on March 20, 1984.

(Violation of Title 18, United States Code, Section 1503).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs One through Five of Count One are hereby realleged and incorporated by reference herein as though set forth in full in the instant count.

2. From on or about March 26, 1984, to June 1984, at Fairfax, Virginia in the Eastern District of Virginia, ROBERT B.

MACHEN, the defendant herein unlawfully, willfully, knowingly and corruptly did influence, obstruct and impede and endeavor to influence, obstruct and impede, the due administration of justice by causing and directing "S.R.", an employee and secretary of the defendant, to use "white-out" to alter, modify, deface and fabricate books and records subject to the aforesaid Grand Jury subpoena served on the defendant on March 20, 1984, including check stub records containing references to attorney "M.K.". (Violation of Title 18, United States Code, Section 1503).

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs One through Five of Count One are hereby realleged and incorporated by reference herein as though set forth in full in the instant count.

2. Between April and June 1984 at Fairfax, Virginia in the Eastern District of Virginia, ROBERT B. MACHEN, the defendant, unlawfully, willfully, knowingly and corruptly did influence, obstruct, impede, the due administration of justice by asking, directing and importuning "S.R.", an employee and secretary of the defendant, to re-write, change, alter and fabricate certain journals, ledgers, books and records of the said defendant which were the subject of and covered by the aforesaid Grand Jury subpoena of Grand Jury No. 84-2, and in particular any journals, ledgers, books and records making a reference to attorney "M.K.".

(Violation of Title 18, United States Code, Section 1503).

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs One through Five of Count One are hereby realleged and incorporated by reference herein as though set forth in full in the instant count.

2. On or about March 21, 1984 to June 1984, at Fairfax, Virginia in the Eastern District of Virginia, ROBERT B. MACHEN unlawfully, willfully and knowingly did engage in misleading conduct toward "S.R.", a secretary and employee of the defendant, with the intent to cause and induce the said "S.R." to alter, destroy, multilate and conceal certain records, documents, journals, ledgers and checkbook stubs, of the defendant, which were the subject of and covered by the aforesaid Grand Jury subpoena served upon the defendant on March 20, 1984, including those records, documents, journals, ledgers and checkbook stubs which contained references to attorney "M.K.",

with the intent to impair the integrity of the aforesaid subpoenaed records, documents, journals, ledgers and ckeckbook [sic] stubbs [sic], and their availability for use in an official proceeding, that is to say, the inquiry, investigation and deliberations of Grand Jury No. 84-2 in the aforesaid matter set forth above, John Doe #630, in that the said ROBERT B. MACHEN did tell, instruct and request "S.R.", the secretary and employee to re-write, change, alter and re-do the said journals, ledgers, records, documents and checkbook stubbs [sic] because the existing records, journals, ledgers, documents and checkbook stubbs [sic] did not give an accurate picture and record of what actually went on in the defendant's accounts and records, including an "overhead account".

(Violation of Title 18, United States Code, Section 1512).

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs One through Five of Count One are hereby realleged and incorporated by reference herein as though set forth in full in the instant count.

2. Between March 21, 1984 and June 1984, at Fairfax, Virginia in the Eastern District of Virginia ROBERT B. MACHEN unlawfully, willfully and knowingly did engage in misleading conduct toward "S.R.", a secretary and employee of the defendant, with the intent to influence, delay and prevent the testimony of the said "S.R.", in an official proceeding, that is to say, the investigation and inquiry of Grand Jury No. 84-2 into the matter styled John Doe #630, as well as the same Grand Jury's investigation and inquiry into acts of obstruction of justice by ROBERT B. MACHEN, and with the

intent to hinder, delay and prevent the communication to a law enforcement officer of the United States, that is to Inspectors and Special Investigators of the Internal Security Division, Internal Revenue Service, Department of the Treasury, information relating to the commission and possible commission of Federal offenses, to wit, possible violations of Title 18, United States Code, Section 205 (conflict of interest) and violations of Title 18, United States Code, Section 1503 (obstruction of justice), in that the defendant did endeavor to coach and instruct "S.R.", the secretary and employee of his law firm to answer and respond to possible future questions of Inspectors and Special Investigators of the Internal Security Division of the Internal Revenue Service, Department of the Treasury concerning the

accuracy, maintenance, completeness and integrity of records, documents, journals, ledgers and checkbook stubbs [sic] of the defendant, which were the subject of the aforesaid Grand Jury subpoena served upon the defendant on March 20, 1984, and did endeavor to convince and cajole the said "S.R." into believing her honest and truthful answers were inaccurate and based on misunderstandings by the said "S.R." as to the nature, contents, significance and accuracy of the records, documents ledgers, journals and checkbook stubbs [sic] she maintained and filled out, as they made reference to attorney "M.K.". (Violation of Title 18, United States Code, Section 1512).

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT;

1. Paragraphs One through Five of Count One are hereby realleged and

incorporated by reference herein as though set forth in full in the instant count.

2. On or about January 30, 1985, at Alexandria, Virginia, in the Eastern District of Virginia ROBERT B. MACHEN, the defendant, unlawfully, knowingly, willfully and corruptly did influence, obstruct and impede the due administration of justice by submitting and furnishing, and causing to be submitted and furnished to the United States Attorney's Office and to Grand Jury No. 84-2, pursuant to the aforesaid Grand Jury subpoena, false, altered, defaced, spurious, and fabricated books, records, ledgers, journals, and documents, including a book of check stubs with "white-out" entries and other records which obliterated and deleted entries and references to attorney "M.K.".

(Violation of Title 18, United States Code, Section 1503 and 2).

COUNT SEVEN

On or about January 30, 1985, at Alexandria, Virginia, within the Eastern District of Virginia, ROBERT B. MACHEN, the defendant, while under oath as a witness in a criminal investigation conducted by and before Grand Jury No. 84-2 of the United States District Court for the Eastern District of Virginia, in a matter entitled United States v. John Doe 630, unlawfully, willfully and knowingly did make false material declarations, and use documents containing false material declarations that is:

1. At the time and place aforesaid, the grand jury was inquiring into and investigating allegations of possible volations of federal conflict of interest laws, including possible violations of Title 18, United States Code, Section 205, the said investigation being designated as

2. It was material to and a part of the aforesaid investigation for Grand Jury 84-2 to obtain from ROBERT B. MACHEN any and all records and books of accounts, including receipts and disbursement journals, overhead account cash receipts and dispersement [sic] totals, checks, check books and check stubs showing receipts credited to "M.K.", and disbursements to and on behalf of "M.K." for the years 1982 and 1983 for or in conjunction with defendant ROBERT B. MACHEN or by "M.K." as a sole practitioner.

3. At the time and place aforesaid, ROBERT B. MACHEN, while under oath, did knowingly declare before said Grand Jury, in relation to Grand Jury exhibits 25, 26 and 28, and did knowingly use before the grand jury said grand jury exhibits, with

respect to the aforesaid material matters, which are underlined below, as follows: ("Q" indicates questions propounded to the defendant, ROBERT B. MACHEN, and "A" indicates answers given by the defendant, ROBERT B. MACHEN. "Witness" is ROBERT B. MACHEN.)

Q Okay. Let me show you then Grand Jury Exhibit No. 25.

(Whereupon, the document referred to as Grand Jury Exhibit No. 25 was marked for identification.)

BY MR. MELSON:

Q Ask you to identify that, please.

A Okay. This is MTOH Cash Receipts Total for 1983 and out on the side it says 1983. Out here it says 1983 and first quarter.

Q All right. And what is MTOH?

A It should be Machen/Thatcher Overhead Account, Overhead.

Q And this is, then the total for 1983?

A Yes.

Q All right. And No. 26.

(Whereupon, the document referred to as Grand Jury Exhibit No. 26 was marked for identification.)

WITNESS: MTOH Cash Disbursements, Totals and it has on it 1984 and this is 1984.

BY MR. MELSON:

Q And these two records, 25 and 26 are also business records that were kept by your employees for you?

A Those are, yes.

Q Are they the originals?

A Yes.

Q Are there any here that are not originals?

A Not that I know. . . . (pp. 9-10)

* * *

WITNESS; My question to you is, is that, do you mean original as opposed to Xerox copies?

BY MR. MELSON;

Q No. My question is are these the records as they were originally prepared, the original records?

A Originally prepared records?

Q Yes. (p. 10)

* * *

WITNESS: These are the original documents that I was able to find in response to the subpoena.

BY MR. MELSON;

Q These are the records that have originally been prepared by the bookkeeper?

A Well, these are the ones that I could find in response to the subpoena....(p.11)

* * *

Q All right. No. 4 is all original checkbooks or books including check stubs of the Machen/Thatcher overhead account for the years 1982 and 1983.

A I didn't quite understand all of that, but here are the check stubs for those two years. (p. 12)

* * *

Q Well, let me put Exhibit No. 28 on the package of stubs which I'll have you identify by beginning and ending number.

A Okay. The beginning number is 1652 and the ending number is 1954.

(Whereupon, the document referred to as Grand Jury Exhibit No. 28 was marked for identification.) (p. 15)

4. The aforesaid declarations and documents made and used by ROBERT B. MACHEN, as he then and there well knew and believed were false and fraudulent, in

that Exhibits 25 and 26 were not the original documents as originally prepared in that the defendant ROBERT B. MACHEN had caused another to change, alter, rewrite, modify and re-do said exhibits in their entirety and that Exhibit 28 was altered, modified, defaced and fabricated in that the defendant ROBERT B. MACHEN did cause another to "white-out" portions of Exhibit 28 so as to alter, modify, deface and fabricate said exhibit.

(In violation of Title 18, United States Code, Section 1623.)

A TRUE BILL

/S/ Gregory J. Cizck

FOREMAN

HENRY E. HUDSON
UNITED STATES ATTORNEY

BY: /S/Kenneth E. Melson
Kenneth E. Melson
Assistant United States Attorney

/S/Justin W. Williams
Justin W. Williams
Assistant United States Attorney

APPENDIX H

[Testimony at trial of Robert B. Machen December 8, 1987]

Questions by Mr. Schaars

* * *

Q There came a time when you did get another subpoena, is that correct?

A Oh, yes.

Q Could you tell the ladies and gentlemen of the jury very briefly when and where you were served?

A I was in trial in Fairfax County Court. I think I represented Mrs. Mayhew. They took the afternoon break and Mr. Rice came in, I believe it was Mr. Rice, or at least an agent came in. There were always two of them. And they handed me the subpoena, which was to immediately bring the records down to the grand jury room right then.

Q Right then that afternoon?

A Right then. I was supposed to

leave Court and come to Mr. Swersky's office, pick up the records and bring them to the grand jury.

Q And what did you do after you got that subpoena?

A Well, I called Mr. Melson, if I remember -- I belief [sic] it was Mr. Melson at the time; that was the only person that I could get in touch with Mr. Swersky. Mr. Rice I believe told me that I would have to clear not coming on that subpoena with Mr. Melson, so I called him direct at that time, as I remember.

Q And as a result of the conversation with Mr. Melson, were you able to appear the next day?

A Yes.

Q Did you have a chance to talk to Mr. Swersky before you appeared in the grand jury that next day?

A Well, we came down. I met him in

his office. We came over and actually sat outside in the witness room for an hour, hour-and-a-half.

Q And did you talk about appearing in the grand jury?

A Yes.

Q Did you talk about your expected testimony?

A Yes, I did.

Q Did you talk about the fact that you were holding records that had white out all over them?

A Yes. That was common knowledge since about June of last, the year before.

Q Did you talk to him about the fact that some of the overhead totals had changed?

A Yes.

Q And MK had been taken off, the initial MK had been taken off some of the documents?

A Yes, I did.

Q Did you seek from Mr. Swersky some legal advice on how to deal with questions that might come up with regard to the documents and the white out and so on at that time?

A Well, it was my understanding when I went in to the grand jury that I was going to be asked specifically about those two instances on the checks and on the totals.

Q And when you went in to the grand jury, were you asked about them?

A No, I was not.

Q While you were in the grand jury, Mr. Swersky was out in the hall, was he not?

A He was right out there, yes, sir.

Q Did there come a time when you were in the grand jury that you stepped out?

A I did it on, I believe, three

occasions.

Q When you stepped out in the midst of your testimony, did you talk to Mr. Swersky?

A Yes, I did.

Q What did you say to him?

A Well, I had been asked were these original documents. And original documents have a different meaning to the lay person than they do to a lawyer. These are originals if they are hand written, and if they are hand written, they are originals.

Q That was your understanding?

A Well, I think I am backed up by Friend on evidence in Virginia about that.

Q That was your understanding at that time, is that correct?

A Yes.

Q And you talked to Mr. Swersky about that, did you not?

A Yes.

Q You talked about how to answer those questions and answer them truthfully, did you not?

A I sure did.

Q And you went back in to the grand jury, is that correct?

A That is exactly right.

Q When you went back in, were you asked more questions?

A I was asked basically the same question in a different way about originals.

Q Did you endeavor to follow the advice your attorney gave you?

A I believe I followed it exactly.

Q Each time you stepped out of the grand jury, was the process essentially the same? You would step out, and talk to Mr. Swersky, and go back in?

A Yes. Yes, it was, but it was

disconcerting because Mr. Swersky each time asked me when I walked out, "Have you been asked about the changes on the documents?"

Q Were you ever asked about changes?

A I never was.

Q When you left the grand jury room, did you then rejoin the company of Mr. Swersky?

A Yes. Right out here.

Q Did you talk to him at that time?

A Well, I told him that I never had been asked about the white outs and the total, the ledger on, the summaries.

Q The total summaries, the MTOH summaries?

A Yes.

Q Did you make any demands upon Mr. Swersky at that point?

A Well, I wanted to see what you had to do to go back in after we talked for

just a minute. But Mr. Melson walked outside with the documents and left. He came by us at least.

APPENDIX I

[Trial Testimony of Robert B. Machen, December 8, 1987]

Questions by Mr. Schaars

Q You have had the opportunity prior to testifying today to review a transcript of your grand jury testimony of January 30, 1985; is that correct?

A Yes, I did.

Q Given the opportunity now if you had it, would you change anything you said in that grand jury?

A No. That is the absolute truth. That was the documents that I had picked up, and as I understand the original were. Having heard argument and gone through what I have gone through, the hell that I have been through, I would have interrupted and told Mr. Melson right then, hey, you didn't talk to me about the white outs, and you didn't talk to me

about these changed documents. But I didn't know you could do that when I was in the grand jury.

Q From your perspective was what you said there the truth?

A Absolutely.

MR. SCHAARS: No further questions, Your Honor.

MR. MELSON: I have the same inquiry with respect to whether we can take a break.

THE COURT: I have the same answer.

MR. MELSON: May we approach the Bench?

THE COURT: Yes, sir.

(Thereupon, a conference was held at the Bench with Court and counsel, out of hearing of the jury, and reported as follows:)

MR. MELSON: Your Honor, several times during Mr. Machen's testimony he has

indicated that the reason he did not make statements concerning the explanation of the changes in the documents was because the Government never asked him those questions. He in effect is having it two ways. He first goes in, claims the Fifth Amendment so that the Government cannot ask him all those questions and now is saying the Government didn't ask those questions. That is why I didn't tell them about the changes. Because they didn't ask me about what happened to them or who did it or anything like that. I don't think he can have it both ways. I think his direct examination has opened the door for me to explore with him the fact that he took the Fifth Amendment with respect to any testimonial aspects of his appearance and was granted immunity with respect to production of them.

MR. WILLIAMS: We have got case law,

too, I want to show the Court.

THE COURT: I am not going to open up that, no.

MR. MELSON: There is no way the Government then can rebut his inference the only reason he didn't say anything is because we didn't ask, and it really seems that it puts the Government in an unfair position because he is using that as a two-edge sword, to slice us one way by not allowing me to ask and then slicing the other way in commenting on our failure to ask. It seems to me those cases are very clear. It's not going to take up time. It's not going to be distracting to the jury. The question is simply at the time he went in, had asserted the Fifth Amendment privilege concerning questions other than the actual production of those records. I think it's paramount for, just in fairness for the jury to understand;

otherwise it misleads them is what it's doing. I really think it's significant for the jury to understand that.

MR. WILLIAMS: I would also like to show the Court the Gravel Case (phonetic) which is still good law. I would like to at least give the Court the cite of the Gravel -- Gravel was a case where the defendant was tried the first time. He didn't testify. He maintained --

THE COURT: Did he take the Fifth Amendment?

MR. MELSON: Yes. He requested Production Act immunity, indicating that he was going to take, through his attorney, that he was going to take the Fifth Amendment with respect to the testimonial aspects of his appearance and had requested the Production Act immunity. If he wasn't going to take testimonial Fifth Amendment there is no reason for him

to take Production Act.

MR. WILLIAMS: What he does in the grand jury then when Mr. Melson asked him, is this the original, he says, Mr. Melson, the thing that we have had previously redacted, we still have the unredacted, he sayd [sic] in there, Mr. melson asked him, "Are you taking the Fifth Amendment to that?" And he indicates that he is.

It seems to me that there are two parts to it. The first part of course is the fact he was testifying under a grant of production immunity. We had the order read to him and having so -- he understands it. He then of course goes on in there. He has testified now that he wanted to talk about it and everything else but in fact in his testimony he refused to so this is your situation where it's really covered by the Gravel kind of situation, Jenkins versus Anderson

(phonetic) and Gravel which is discussed in that case.

I would like if possible if during a very brief recess --

THE COURT: Let me hear from Mr. Schaars.

MR. SCHAARS: Your Honor, I don't think we have opened any doors.

THE COURT: You have left the impression that if he had been asked these questions, he could have exonerated himself.

MR. SCHAARS: The only impression he left, I would respectfully suggest, is that if he were asked about white out, he would have answered. It was his understanding and will be his understanding I think to his dying day, whether that is accurate or inaccurate, that he went into that grand jury to be asked about white out and he was never

asked. It is absolutely correct that the redacted portion of the grand jury transcript, which is two lines or three lines on page 11 I think has a question, "Are you taking the Fifth Amendment with regard to this?" and he said yes. He will testify if asked and I suggest that the question should not be asked because we haven't opened the door to provide this opportunity to drive a tank through, he was only doing what his attorney said and he was only acting consistent with that.

THE COURT: He can take the Fifth on the advice of attorney but I don't think he can testify as he has and leave the impression that yes, if I would have just been asked I could have given the explanation of that. I will let you go into that.

(Thereupon, the conference at the Bench was concluded, and the following

proceedings were held:)

THE COURT: We'll take a short recess.

(Whereupon, at 3:27 o'clock p.m., a short recess was taken.)

MR. MELSON: May I proceed, Your Honor?

THE COURT: Yes, sir.

CROSS EXAMINATION

BY MR. MELSON:

Q Good afternoon, Mr. Machen. You ended your direct examination by telling the jury that had you been asked about the changes in the records, the rewriting of the overhead journal and the changes made and obliterations to the checking account, that you would have told the grand jury. Isn't it a fact, Mr. Machen, that when the prosecutor in this grand jury case asked you about whether they were the originals, that you took the Fifth Amendment and refused to answer on those grounds?

A Yes, sir, on advice of counsel, I

did; and I also -- but you weren't asking about the originals of the documents, you were asking -- they were supposed to be asking me were there any change[s] because the originals were there.

Q Let me ask you -- tell you the question I was asking. I will refer you to the transcript. My question is: "Are these the originals as they were originally prepared, the original records?"

And you took the Fifth Amendment to that question.

Now, did that give you the opportunity to tell the ladies and gentlemen of the grand jury that these are not the original records, not as they were originally prepared, but they were a rewritten set of records or that the records had been altered, changed or obliterated? Isn't that a fact, Mr. Machen?

A No. They were the originals as I had gotten them and brought them and picked them up that night. That is what the whole question was about, and I kept telling you again and again. These are the originals from the night that I picked them up on the 20th when the grand jury was there.

Q You are aware, are you not, that with respect to -- to your testimony, your verbal testimony in that case, in the grand jury regarding matters surrounding the Mark Kellogg case, which the grand jury was investigating, that if you took the Fifth Amendment, I couldn't ask you any questions about that, isn't that correct? Anything you invoked the Fifth Amendment on could not be inquired into by the prosecutor? Isn't that right?

A I didn't know that, no.

Q You went to law school at George

Mason University, and they have criminal procedure classes, don't they?

A Yes.

Q And in criminal procedure you talked about the Fifth Amendment to the United States Constitution? Isn't that correct?

A That's true.

Q And as a defense attorney when you graduated from law school, isn't it a fact that one of the motions you frequently make particularly in State Court are motions under the Fifth Amendment to suppress statements defendants give to police or in other situations in which he may have a right not to testify against himself?

A In about 300 trials since I have been out, I have never had anyone take the Fifth Amendment.

Q I understand that but you are aware

of what the Fifth Amendment is.

A Yes. It's a protection.

Q Isn't it also a fact, Mr. Machen, that on the day that you appeared before this grand jury in January of 1985 to produce the records that are in question, that is L-17 and 18, the rewritten journals and obliterated and altered checkbook stubs that you were appearing before that grand jury under what is called Production Act immunity?

A Yes.

Q Isn't that correct?

A Yes.

Q Do you recall prior to your substantive delivery of the documents before the grand jury, your being read an order by this very District Court that says, "The Court instructs the witness, Robert B. Machen, that when he complies with the Court order of immunity and

surrenders the documents the fact of his compliance with the afore described subpoenas may not be used against him in any criminal case except in a prosecution of perjury, making false statements or failing to comply with the Court's order of immunity." Do you recall that?

A Yes.

Q Then you were aware that if you went into that grand jury, delivered those documents and told the grand jury the truth, that those ledgers were rewritten and the checkbooks had been altered, that there could have been no criminal liability on you because those statements could not have been used against you but because you committed perjury, you put yourself in jeopardy, in criminal jeopardy, and as a result were indicted? Isn't that correct?

A No, it's not. You were supposed to

ask me, and I was supposed to answer you and that was the agreement since June, and in October again, and on the 17th day of July that when I came in that grand jury if I ever did, that you were going to ask me was the documents changed, were these originals that I picked up on the 20th changed and that is my understanding, and you never asked me.

Then when I had to go outside I had such a limited immunity to answer you on any other questions, except those two questions which my lawyer handled specifically, and when we talked outside that grand jury standing right out there, he says, "What the hell is going on? What have you done? You didn't ask him the right question?" And you know that and then you handed Mr. Rice the documents and he left with them and that's the last time I have seen them until you indicted me

five years later -- three years later.

Q Could I ask that you answer?

A That's my answer.

Q The question is, in the grand jury, did you invoke the Fifth Amendment?

A I did on the advice of counsel because the way you were asking the question, you wanted me to elaborate.

APPENDIX J

[Government's Opening Argument, Justin Williams, December 9, 1987]

Now, ladies and gentlemen, on the stand, in his testimony before he was cross examined, Mr. Machen would have you believe he was so anxious to explain in the grand jury, he was so anxious to explain what had happened, you know, concerning these particular -- you know, the questions weren't asked. Ladies and gentlemen, from the cross examination, and I recommend to you highly, read that entire grand jury transcript, M-4. That wasn't the situation at all. He knew that he had, it was immunity. He is not getting sucked into the grand jury. He had immunity, Production Act immunity, he was there as a witness, and the fact of producing the documents, the original documents that were called for and

testifying truthfully about those documents, authenticating them, whether they were you know the originals, did he bring the originals. He couldn't have been prosecuted. But take a look at that transcript. It wasn't a situation. He had the opportunity, but he did not. He took the Fifth Amendment about it, and I suggest to you from the testimony you saw here, sought to mislead you about what he was really doing, because it would have been the most easy thing to explain because he couldn't have been prosecuted for that truthful explanation.

Instead, what he did was to go ahead as part of the very same pattern of conduct and which is the basis of Count VI, the obstruction, when he actually submits the altered documents to the grand jury, and in addition, perjures himself there.

Now, incidentally, one thing that I just want to bring to your attention: Mr. Swersky confirmed that there were two productions, one through Mr. Swersky in June of 1984. The key documents here, L-17 and L-18, and I commend you to look at them, they will have on them, show you the grand jury sticker number that is referred to in the transcript, and it's also here.

Those grand jury transcripts show that these documents were in fact brought to the grand jury and were testified about, and also of course the whited out check stubs by this defendant, who does not, he submits in fact altered documents to the grand jury, and the Court will tell you as a matter of law that these documents are material and his testimony about that are material to the grand jury's investigation. You can see from the transcript, read the transcript, and he is

a lawyer, he knows what the meaning of the words are. He was playing games, ladies and gentlemen, I suggest to you, from the testimony in the transcript, and he was submitting altered documents to the grand jury; and without disclosing the fact that these had material false statements in them, and his testimony itself was false.

* * *

[Government's Closing Argument, Kenneth Melson, December 9, 1987]

He indicated that Mr. Rice was confused in the grand jury, and therefore this defendant should not be prosecuted. There is a difference between Mr. Rice and the defendant. Mr. Rice was confused. This defendant's actions were deliberate in that grand jury. He had immunity when he got in there. All he had to do was say the truth and there would have been no

consequences to him. He could have said these are not the original records and there would have been no consequence to him. He didn't do that. He said on the stand yesterday that the reason he didn't is because he wasn't asked. Well, when he was asked about the records, the second or third time he took the Fifth Amendment. Look at the transcript. The first time that he is asked questions about Exhibit 25 and 26, the grand jury exhibits, which are L-17 and 18, the Government's Exhibits in this case that were rewritten, he was asked, "Are they the originals?" And he says, "Those are, yes."

And then when I began to ask him, "My question is are these the records as they were originally prepared, the original records?"

Didn't that give him an opportunity to say, no, they are not the original

records. They are the ones that Dorothy Machen, they are the ones that Susie Rosenbrook rewrote from Dorothy Machen? He had the opportunity yet he was trying to convince you on the stand before the Fifth Amendment issue came out that he wasn't asked and didn't have an opportunity. Woe be Mr. Machen.

That wasn't the case, ladies and gentlemen. You will have the transcript to read in the jury room.

With respect to advice of counsel, he asserts that as a defense to the perjury. He did not fully disclose to Mr. Swersky his involvement. Sure he admitted that things according to Mr. Swersky had been altered, but he did not tell Mr. Swersky that he altered the records. If he had told that to Mr. Swersky, his representation of the defendant would have been different, as Mr. Swersky admitted

that it would be if he had -- he cannot fully represent an individual without knowing all the facts.

I submit to you that if Mr. Swersky knew that the defendant had altered those or had them altered at his direction, that this defendant's reaction in the grand jury would [sic] have been different, because he had an open road to come into the grand jury without any threat of that statement being used against him to say yes, I altered [sic] the records and they are altered. Those statements could not have been used against him and you will see the order of the Court saying that recited in the first couple of pages of the grand jury, which says, "Your statements in that grand jury can't be used against you, Mr. Machen. So you tell the truth."

But he didn't. And you can't look at

that in a vacuum either, his statement on that date. Look at it in the context of the entire actions from March 20th. Look at what he was doing, look at his intent, his motive, all the way from March 20th up to January 30th, and his reaction in there then is very predictable and very explainable. It's not because he was confused. It's not because he wasn't asked the question. It's because he was still trying to mislead and deceive. And indeed it did the grand jury because then they had a conflict in the testimony between him and Ms. Rosenbrook. It was material to their investigation.

All he had to say was the truth but he didn't. He didn't take that opportunity that the Court gave him.

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